Five Star Heritage Sdn Bhd & Ors v Nai Ninn Sararaksh & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)(NCvC)(W)-2553–12 OF 2017
LEE SWEE SENG, ABU BAKAR JAIS AND AHMAD ZAIDI IBRAHIM JJCA
15 MARCH 2023

Civil Procedure — Government proceedings — Consent of Attorney General — Originating summons challenging validity of court order pertaining to land that was part of public charitable trust instituted before written consent of Attorney General was obtained under s 9 of the Government Proceedings Act 1956 — Whether consent of Attorney General could be retrospective in light of clear wordings and pre-requisites stated in s 9(1) and mandatory nature of s 9(2) of Government Proceedings Act 1956 — Government Proceedings Act 1956 s 9

Of the four appeals, three appeals arose from the judicial review ('JR') proceedings while the fourth appeal arose from proceedings related to an originating summons ('OS 1128'). Vide a trust indenture dated 30 May 1845, the East India Co created a Burmese-Siamese trust over a plot of land ('Lot 104') in Georgetown subject to terms and conditions ('the trust'). On Lot 104 was a temple serving the Burmese and Siamese communities living on the island of Penang, and their successors in the trust. Lot 104 was eventually partitioned between the two communities, becoming Lot 2102 for the Siamese community and Lot 2103 for the Burmese community. Subsequently, the trustees for the Burmese community ('Penang Burmese trustees') executed a new trust deed and entered into a joint-venture agreement with Airmas Development Sdn Bhd to commercially develop Lot 2103. A court order was obtained on 31 October 2007 to declare that this joint-venture agreement was validly entered into by the parties. As part of that development, Lot 2103 was subdivided into Lots 10029 and 10030, with Lot 10029 registered in the name of the developer while Lot 10030 was registered with the Penang Burmese Trustees. The developer then commenced an action against Nai Ninn Sararaksh ('Nai Ninn'), inter alia, for vacant possession of premises located on Lot 10029. Nai Ninn filed his defence and also counterclaim, claiming that he was the owner of the premises and was not obliged to deliver vacant possession as Lot 10029 was part of a charitable trust; and that the developer's ownership of Lot 10029 was questionable. Meanwhile, vide OS 1128 filed in 2014, Nai Ninn and Ho Choon Teik ('Ho') challenged the validity of the court order dated 31 October 2007, that because Lots 10029 and 10030 were part of a public charitable trust, the Attorney General's ('AG') consent under s 9 of the Government Proceedings Act 1956 ('the Act') must first be secured before the

order may be secured. Since there was none, the order was invalid and must be set aside *ex debito justitiae*. Although OS 1128 was filed in 2014, both Nai Ninn Sararaksh and Ho Choon Teik themselves did not procure the AG's consent to file the action until 31 May 2016. Together with the developer and the Vice-Chairman of the Penang Burmese Association, the Penang Burmese trustees filed the JR proceedings on 30 August 2016 seeking to quash the AG's consent dated 31 May 2016. In OS 1128, the High Court allowed the claim and set aside the joint-venture agreement. The High Court in the JR proceedings allowed the application and quashed the AG's consent. Both parties appealed against those respective decisions, and the Court of Appeal allowed the appeals in respect of the JR proceedings whereas the decision of the High Court in respect of OS 1128 was allowed in part. Hence, these appeals.

Held, allowing the appeals:

(1) The failure to comply with the mandatory requirements in s 9 of the Act rendered any action or suit instituted not maintainable. In these appeals, not only was OS 1128 filed before the written consent of the AG was obtained, the written consent when finally obtained, was also clearly outside the terms prescribed by s 9 of the Act. Nai Ninn was the sole plaintiff in OS 1128 when it was filed in 2014. He did not secure the AG's written consent at the time of filing. Ho, on the other hand, applied to intervene and be joined as an additional plaintiff to OS 1128 which had already been filed by Nai Ninn. Both of them then made that single application and the AG gave his written consent on 31 May 2016. This written consent not only did not meet the terms of s 9(1) of the Act, it clearly exceeded the restrictions imposed by s 9 of the Act. The written consent was liable to be quashed, rendering OS 1128 as not maintainable and the High Court was thus right in issuing the order of certiorari quashing the said decision. Further, the distinction of separate purpose or objective by Nai Ninn and Ho illustrated that their respective application was outside the meaning of the words 'two or more persons'. In the case of Nai Ninn, his application was obviously outside the terms of s 9(1) of the Act as the AG's consent was sought long after he had filed OS 1128; almost as an afterthought (see paras 28 & 36–39).

(2) It could not be said that the AG was empowered to give consent retrospectively as this, quite clearly, run contrary to the express terms of s 9(1) of the Act. The written consent of the AG used the term 'meneruskan' which translated to mean 'carry on' or 'continue'. Such a term did not have the effect of retrospectivity but merely connoted permission or consent to proceed with what had already been started. Such a consent took effect from the date of the consent itself which was 31 May 2016 and not 15 December 2014, the date when OS 1128 was filed. This left OS 1128 bereft of the necessary consent at the material time when it was instituted in 2014. The term 'meneruskan' was also not

found in s 9 of the Act at all, especially in s 9(1), in which case the impugned consent was without the authority of law. In addition, the Court of Appeal had overlooked the presence of s 9(2) of the Act which reminded the importance of compliance with the requirements of s 9(1) of the Act. Section 9(2) of the Act reiterated the mandatory requirement of securing written consent before institution of a suit. Since OS 1128 was instituted before AG's consent under s 9(1) of the Act was obtained, it was not 'in conformity with that subsection' (see paras 40–42 & 45–46).

[Bahasa Malaysia summary

Daripada empat rayuan, tiga rayuan timbul daripada prosiding semakan kehakiman ('SK') manakala rayuan keempat timbul daripada prosiding berkaitan satu saman pemula ('SP 1128'). Melalui perjanjian amanah bertarikh 30 Mei 1845, Sykt Hindia Timur mewujudkan amanah Burma-Siam ke atas sebidang tanah ('Lot 104') di Georgetown tertakluk kepada terma dan syarat ('amanah'). Di atas Lot 104 terdapat satu kuil kepada komuniti Burma dan Siam yang tinggal di Pulau Pinang, dan pengganti mereka dalam amanah. Lot 104 akhirnya dipecah milik antara dua komuniti tersebut, menjadi Lot 2102 untuk komuniti Siam dan Lot 2103 untuk komuniti Burma. Selepas itu, pemegang amanah untuk komuniti Burma ('pemegang amanah Burma Pulau Pinang') melaksanakan surat ikatan amanah baru dan memeterai perjanjian usaha sama dengan Airmas Development Sdn Bhd untuk membangunkan secara komersial Lot 2103. Perintah mahkamah telah diperoleh pada 31 Oktober 2007 untuk mengisytiharkan bahawa perjanjian usaha sama ini telah dibuat secara sah oleh pihak-pihak. Sebagai sebahagian daripada pembangunan itu, Lot 2103 telah dibahagikan kepada Lot 10029 dan 10030, dengan Lot 10029 didaftarkan atas nama pemaju manakala Lot 10030 didaftarkan dengan pemegang amanah Burma Pulau Pinang. Pemaju kemudiannya memulakan tindakan terhadap Nai Ninn Sararaksh ('Nai Ninn') antara lain untuk milikan kosong premis yang terletak di Lot 10029. Nai Ninn memfailkan pembelaannya dan juga tuntutan balas, mendakwa bahawa dia adalah pemilik premis dan tidak bertanggungjawab untuk menyerahkan milikan kosong kerana Lot 10029 adalah sebahagian daripada amanah amal; dan bahawa milikan pemaju Lot 10029 boleh dipersoalkan. Sementara itu, melalui SP 1128 yang difailkan pada 2014, Nai Ninn dan Ho Choon Teik ('Ho') mencabar kesahihan perintah mahkamah bertarikh 31 Oktober 2007, kerana Lot 10029 dan 10030 adalah sebahagian daripada amanah amal awam, kebenaran Peguam Negara ('kebenaran PN') di bawah s 9 Akta Prosiding Kerajaan 1956 ('Akta') mesti diperolehi terlebih dahulu sebelum perintah itu boleh diperolehi. Oleh kerana tiada, perintah itu tidak sah dan mesti diketepikan *ex debito justitiae*. Walaupun SP 1128 telah difailkan pada 2014, kedua-dua Nai Ninn Sararaksh dan Ho Choon Teik sendiri tidak mendapatkan kebenaran PN untuk memfailkan tindakan itu sehingga 31 Mei 2016. Bersama-sama dengan pemaju dan Naib Pengerusi Persatuan Burma Pulau

Pinang, pemegang amanah Burma Pulau Pinang memfailkan prosiding SK pada 30 Ogos 2016 bertujuan untuk membatalkan persetujuan PN bertarikh 31 Mei 2016. Dalam SP 1128, Mahkamah Tinggi membenarkan tuntutan itu dan mengetepikan perjanjian usaha sama. Mahkamah Tinggi dalam prosiding SK membenarkan permohonan itu dan membatalkan kebenaran Peguam Negara. Kedua-dua pihak merayu terhadap keputusan masing-masing, dan Mahkamah Rayuan membenarkan rayuan berkenaan dengan prosiding SK manakala keputusan Mahkamah Tinggi berkenaan SP 1128 dibenarkan sebahagiannya. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan-rayuan:

(1) Kegagalan untuk mematuhi keperluan mandatori dalam s 9 Akta menyebabkan sebarang tindakan atau saman yang dimulakan tidak dapat dikekalkan. Dalam rayuan ini, bukan sahaja SP 1128 difailkan sebelum kebenaran bertulis PN diperolehi, kebenaran bertulis apabila akhirnya diperoleh, juga jelas di luar terma yang ditetapkan oleh s 9 Akta. Nai Ninn adalah plaintif tunggal dalam SP 1128 apabila ia difailkan pada 2014. Dia tidak mendapatkan kebenaran bertulis PN pada masa pemfailan. Ho, sebaliknya, memohon untuk campur tangan dan menyertai sebagai plaintif tambahan kepada SP 1128 yang telah difailkan oleh Nai Ninn. Kedua-dua mereka kemudiannya membuat permohonan tunggal dan PN memberikan kebenaran bertulisnya pada 31 Mei 2016. Kebenaran bertulis ini bukan sahaja tidak memenuhi syarat s 9(1) Akta, ia jelas melebihi sekatan yang dikenakan oleh s 9 Akta tersebut. Kebenaran bertulis itu boleh dibatalkan, menjadikan SP 1128 sebagai tidak boleh dikekalkan dan Mahkamah Tinggi adalah betul dalam mengeluarkan perintah certiorari yang membatalkan keputusan tersebut. Selanjutnya, perbezaan tujuan atau objektif yang berasingan oleh Nai Ninn dan Ho menggambarkan bahawa permohonan masing-masing adalah di luar makna perkataan 'two or more persons'. Dalam kes Nai Ninn, permohonannya jelas di luar terma s 9(1) Akta kerana kebenaran PN telah dipohon lama selepas dia memfailkan SP 1128; seolah-olah pemikiran terkemudian (lihat perenggan 28 & 36–39).

(2) Tidak boleh dikatakan bahawa PN diberi kuasa untuk memberikan persetujuan secara retrospektif kerana ini, dengan jelas sekali, bertentangan dengan terma nyata s 9(1) Akta. Kebenaran bertulis PN menggunakan istilah 'meneruskan' yang diterjemahkan bermaksud 'carry on' atau 'continue'. Istilah sedemikian tidak mempunyai kesan retrospektif tetapi hanya bermaksud keizinan atau kebenaran untuk meneruskan apa yang telah dimulakan. Kebenaran sedemikian berkuat kuasa dari tarikh kebenaran itu sendiri iaitu 31 Mei 2016 dan bukan 15 Disember 2014, tarikh OS 1128 difailkan. Ini menyebabkan SP 1128 ketiadaan kebenaran yang diperlukan pada masa material apabila ia

dimulakan pada tahun 2014. Istilah 'meneruskan' juga tidak terdapat dalam s 9 Akta sama sekali, terutamanya dalam s 9(1), yang mana dalam hal ini kebenaran yang dipersoalkan adalah tanpa kuasa undang-undang. Di samping itu, Mahkamah Rayuan telah mengabaikan kehadiran s 9(2) Akta yang mengingatkan kepentingan pematuhan kepada keperluan s 9(1) Akta. Seksyen 9(2) Akta mengulangi keperluan mandatori untuk mendapatkan kebenaran bertulis sebelum memulakan saman. Memandangkan SM 1128 telah dimulakan sebelum persetujuan PN di bawah s 9(1) Akta diperolehi, ia tidak 'in conformity with that subsection' (lihat perenggan 40–42 & 45–46).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) v Peguam Negara Malaysia [2021] 5 MLJ 303, CA (refd)

Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531, HL (refd)

Ledchumanan Nagappan v R Nadarajah & Ors [1993] MLJU 304; [1993] 4 CLJ 253, SC (refd)

Mohd Aslam Khan bin Syed Gulam (as administrator of the estate of De Bonis Non Sikandar s/o Fajar Ellahi) v C Mageswary a/p Chandran (representative of the estate of Chandaran a/l Narayanasamy, deceased) & Ors [2020] 2 MLJ 642, CA (refd)

Oppenheim v Tobacco Securities Trust Co Ltd and Others [1951] 1 All ER 31, HL (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)

Tetuan Khana & Co v Saling bin Lau Bee Chiang & Ors and other appeal [2019] 3 MLJ 258, CA (refd)

Legislation referred to

Government Proceedings Act 1956 ss 9, 9(1), (1)(c), (1)(d), (2), (2)(g)
National Land Code s 340, 340(2)(b), Form 14A
Probate and Administration Act 1959 s 60(4)(a), (6)

Appeal from: Originating Summons No 24NCVC-1128–12 of 2014 (High Court, Penang)

Karin Lim Ai Ching (with Julinder Sarjit Daliwal, Suppiah a/l Arumugam and Alyssa Lim) (Aznil Naziah Juli & Praba) for the appellant.
Ravin Vello (Vello & Assoc) for the first respondent.

T Gunaseelan (with Balwant Singh Purba) (Balwant Singh & Co) for the second respondent.
Shamsul bin Bolhassan (with Mohammad Al-Saifi Hashim and Nur Syazwani) (Federal Counsel) (Attorney General's Chambers) for the Attorney General.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The dispute in this case has its genesis in a document of some antiquity. It is an indenture of 1845, written in cursive, created by Queen Victoria on behalf of the British Crown, declaring a piece of 5-acre land be held as a public charitable trust for the Thai and Burmese community in that part of Penang Island where Burma Lane is now.

[2] The beauty of a public charitable trust is that the rule against perpetuity does not apply to it and it may well survive the reckless authority of time. The passage of time cannot generally thwart its public charitable purpose for so long as its charitable purpose is still relevant and not spent. Here it is for the advancement of religion of the Thai and Burmese community in Penang and being the religious or spiritual being that we all are, Blaise Pascal's saying would resonate with us: 'There is a God-shaped vacuum in each one of us and the human heart is restless until it finds its rest in God'.

[3] What was once someone's backyard is now prime land not far from the seafront. What was once peaceful and serene has now become a place of strife. Charities and religions may not make its adherents more amenable to living harmoniously with one another as the wars fought throughout history would testify to this fact. As time marches on relentlessly, differences led to disagreements and disagreements to disputes between the Thai and the Burmese trustees in this single piece of land which they must learn to co-exist. It has to do with the collection from the public of funds which to the Thai is legitimately theirs as they had built a temple on the land whereas the Burmese had not built anything.

[4] The parties went for a 'split' of the land and so the necessary order was obtained on 19 October 1994 from the Penang High Court for the land to be partitioned into two pieces with two separate titles, one going to the Thai trustees and the other to the Burmese trustees. The written consent of the Attorney General ('AG') was also obtained for the application to the High Court.

[5] The mistrust simmered and so an application was made to the AG for his written consent under s 9 of the Government Proceedings Act 1956 ('the GPA') for the commencement of an action in the High Court for the appointment of trustees respectively for the Burmese community and the Thai community and

for one lot in Lot 2102 to be vested in the name of the trustees of the Thai community and the other lot in Lot 2103 to be vested in the name of the trustees of the Burmese community. The AG gave his written consent.

[6] The High Court order was obtained on 3 October 2002 and an order was also made for the funds then placed under the management of a receiver and manager to be split equally between the Thai trustees and the Burmese trustees. Nai Ninn Sararaksh ('Nai Ninn'), a Thai, whose forbears had been staying in a house erected on the land, found his house now being on the Burmese portion of the land after partitioning. It was nothing to him then as no one disturbed his quiet possession of the house in No 3 Burma Lane, Penang.

[7] Another defining milestone in this public charitable trust saga was when the second to the fifth defendants in the High Court below applied to the High Court in 2007 and obtained an order on 31 October 2007 to have themselves appointed as the new trustees based on a new trust deed executed on 31 July 2006 wherein they stated that they consented to be appointed as the Penang Burmese trustees of the Burmese Community of Penang and that Lot 2103 would be held in trust by them.

[8] They also prayed for in the same application and obtained a further order that the joint venture agreement ('JVA') dated 25 August 2006 which they signed with a developer Airmas Development Sdn Bhd to develop Lot No 2103 wherein the developer shall construct a three-storey shop offices or other commercial buildings, be approved.

[9] Along the way the Burmese portion of the land that had been partitioned in 1994 was subdivided into two pieces of land. Thereafter the new trustees transferred one of the subdivided titles in Lot 10029 to the first appellant here, Five Star Heritage Sdn Bhd ('Five Star'), a company incorporated by the developer to undertake the JVA. The other lot in Lot 10030 remains in the name of the new trustees. All these were done without the written consent of the AG under s 9 of the GPA.

[10] What happened subsequently was like the stirring of the hornets' nest, spawning many actions in court involving among other issues the justiciability of the AG's consent under s 9 of the GPA which ended in the Federal Court. The Federal Court decided that the AG's consent was justiciable and subject to judicial review in civil matters such as whether or not his written consent should be given to allow a litigant to commence an action involving a public charitable trust. See the Federal Court case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443.

[11] Meanwhile Five Star had filed a suit in the Penang Sessions Court for delivery of vacant possession against Nai Ninn and the matter was finally transferred to the High Court for disposal.

[12] Nai Ninn, as the first plaintiff in the High Court below, managed to obtain the AG's consent for an originating summons that he had filed in the Penang High Court Originating Summons No 24NCVC-1128–12 of 2014 ('OS 1128') to continue with his action against Five Star and the new trustees.

[13] Nai Ninn sought various declarations including that the transfer of the land in Lot 10029 to Five Star is illegal and unlawful and thus null and void for want of a written consent by the AG, as the land is held under a public charitable trust which purpose still subsists to this day.

[14] The main plank of argument of Five Star and the four trustees in OS 1128 where they were the first to the fifth defendants respectively was that the public charitable trust had ceased to be a public charitable trust with the 1994 court order allowing the partitioning of the land into two portions; the Thai and the Burmese portion. That was further reinforced by another court order of the Penang High Court of 3 October 2002 wherein the proceeds of the trust fund in the hands of the receiver and manager were ordered to be distributed equally between the Thai trustees and the Burmese trustees and a further order made for the appointment of new trustees.

[15] Building up on that argument is that the public charitable trust had become a private trust and as such the AG's consent in writing is not necessary and so the appointment of the new trustees and the transfer of the one piece of the subdivided land in Lot 10029 belonging to the Burmese trust to Five Star was a valid transfer.

[16] One Mr Ho Choon Teik ('Ho') also managed to obtain the AG's consent to join in the proceedings and successfully applied to intervene as the second plaintiff in OS 1128.

AT THE HIGH COURT

[17] The High Court in Justice Azmi bin Ariffin J decided on 24 November 2017 in favour of the plaintiffs in the re-amended OS in encl 53 and granted them all the reliefs they prayed for.

[18] In the re-amended OS No 1128 filed by the plaintiff (initially the first plaintiff before Ho intervened to become the second plaintiff), the orders sought were:

(a) an order that the defendants disclose all documents, cause papers and/or pleadings in all the proceedings in this court involving the registration of the defendants' names on the Register Document of Title in respect of Lot 2103, Seksyen 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran Pendaftaran No 61390 ('Lot 2103') which was subdivided into Lot No 10029, Seksyen 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran No Hakmilik H.S(D) 18532 ('Lot 10029') and Lot 10030, Seksyen 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran No Hakmilik HS(D) 18533 ('Lot 10030');

(b) an order declaring that the subdivision of Lot 2103 into two lots, that is Lot 10029 and Lot 10030 was in contravention of the law and therefore unlawful and illegal, null and void and of no legal effect;

(c) a declaration that the registration of the first defendant, that is, Five Star Heritage Sdn Bhd on Lot 10029 and the registration of the second, third, fourth and fifth defendants as trustees of the Burmese trust on Lot 10030 was contrary to law, unlawful, illegal, null and void and of no legal effect;

(d) an order that copies of the original register document of title/grant of Lot 10029 and Lot 10030 be deposited in this court and thereafter be forwarded to the AG;

(e) an order setting aside the order of the Penang High Court dated 31 October 2007 made in the Penang High Court Originating Summons No 24–376–2007 dated 9 March 2007 made by way of *ex debito justitiae* on the ground that the High Court was not seised of jurisdiction and the 2007 order was obtained without the consent of the AG under s 9 of the Government Proceedings Act 1956;

(f) an order setting aside the registration of the names of the defendants on the Register Document of Title of Lot 10029 and Lot 10030 as registered owners *ex debito justitiae* on the grounds of lack of jurisdiction as no consent of the AG was obtained under s 9 of the Government Proceedings Act 1956;

(g) a permanent injunction to prevent the defendants either by themselves or by the servants and/or agents or through anyone else from acting or continue to act or holding themselves out as the registered owners of the public trust property known as Lot 10029 and Lot 10030;

(h) an order to remove the names of the defendants as registered owners of the property known as Lot 10029 and Lot 10030;

(i) an order that the property known as Lot 10029 and the property known as Lot 10030 be returned to the AG and that the name of the AG be registered on the registered document of title of the property known as Lot 10029 and Lot 10030;

(j) an order that the Registrar of Titles, Penang be directed to register the said orders;

(k) an order that the defendants provide accounts of the Penang Burmese Trust Property to the court;

(l) an order that all monies utilised by the second, third, fourth and fifth defendants from 31 October 2007 in respect of the trust property of the Burmese Descendants of Penang be returned forthwith and all monies held by the second, third, fourth and fifth defendants in respect of the trust property of the Burmese Descendants of Penang be returned and deposited with the court and thereafter the Burmese Community of Penang, with the permission or consent of the AG under s 9 of the Government Proceedings Act 1956 be given leave to apply and/or with the directions of this honourable court;

(m) an order that the defendants pay all the costs and fees of the solicitors and all other related costs;

(n) that there be liberty to apply; and

(o) further and other reliefs as this honourable court deems fit.

See pp 559–563 of the Record of Appeal (Vol 3(C)).

[19] The gist of the decision was that the 1994 order did not convert the public charitable trust into a private trust and hence the AG's consent was necessary for the transfer of the land in Lot 10029 to Five Star. The learned High Court judge held that the partitioning of the original land into two portions — the Thai portion and the Burmese portion was for ease of each group administering their own affairs.

[20] The written consent of the AG, not having being obtained, the transfer has to be set aside for being null and void and the other consequential reliefs were granted.

BEFORE THE COURT OF APPEAL

[21] Five Star and the four trustees appealed against the whole of the decision to the Court of Appeal. There were also three related appeals with respect to the judicial review ('JR') applications that was remitted by the Federal Court to the

A High Court to be heard on the merits and the learned judicial commissioner ('JC') having heard the matter on the merits, gave a decision to quash the written consent of the AG.

B **[22]** All the four appeals were heard together before us and this court had allowed the appeal of Nai Ninn, Ho and the AG with respect to the three JR appeals and a separate judgment is written by my learned brother Justice Abu Bakar Jais JCA. There was nothing wrong or improper in the AG granting his written consent for OS 1128 for otherwise it would be oppressive for Nai Ninn who has been asked to vacate his house to defend himself and to inquire into how the land, once held under a public charitable trust had been transferred to Five Star.

C

D **[23]** All that the AG allowed by his written consent is for Nai Ninn to ventilate his claim and for the court to decide without taking side on the issue of the final outcome. We could not see how such a decision vested in him under s 9 of the GPA could be said to have been given unreasonably or irrationally such that no right thinking decision-maker would have given his consent.

E **[24]** This judgment concerns only the appeal from the decision of the High Court in OS 1128. The appellants are Five Star and the four trustees who were the first to the fifth defendants in the High Court. The respondents who were the plaintiffs in the High Court are Nai Ninn and Ho.

F **[25]** The grounds of appeal are summarised in the issues as follows:

(a) whether the public charitable trust had been converted into a private trust;

G (b) whether the transfer of the land by the trustees to Five Star is null and void and to be set aside for want of a written consent from the AG; and

(c) whether the plaintiffs have the locus to bring this action.

H **[26]** The parties shall be referred to as they were in the High Court and sometimes by their names.

Whether the public charitable trust had been converted into a private trust

I **[27]** To be precise the land in issue is now held under two subdivided titles in Lot 10029 (registered under Five Star) and Lot No 10030 (registered under the trustees' names as trustees) after the action taken by the defendants to subdivide Lot 2103 Seksyen 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran No Pendaftaran No 61390 ('the Burmese portion of the land'). The Burmese portion of the land (Lot No 2103) was

originally part of the whole piece of land known as Lot 104 Seksyen 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran (First Grade) No 6719 (Lot No 104) and that Lot 104 ('original trust land') was the subject matter of a religious and charitable trust created by the East India Co on behalf of Queen Victoria by an indenture of trust dated 30 May 1845 for the benefit of the Burmese and Thai Community in Penang.

[28] The trustees of the Burmese Community commenced an action against the trustees of the Thai Community vide Civil Suit No 264 of 1973 at the High Court of Malaya at Penang. By order dated 14 December 1973, the High Court ordered that the trustees of the Thai Community be restrained from collecting the income and rents of the original trust land and it was further ordered that the trustees of the Thai Community be restrained from taking any steps or dispose of or deal with the original trust land. The said order also ordered that a receiver be appointed to collect all rentals and that all income so derived be applied for the upkeep of the temple for the following purposes:

(a) upkeep and maintenance of the temple and all buildings located in the said trust land;

(b) service and lighting of the said temple;

(c) maintenance of the priests of the said temple;

(d) upkeep and maintenance of the burial ground attached to the said temple; and

(e) improvement of the said trust land.

See order dated 14 December 1973 at pp 410–411 of the Appeal Record (Vol 3(C)).

[29] Nan Ninn was puzzled and perplexed when he was served with a summons and statement of claim in respect of the Penang Sessions Court Summons No A52-144–08 of 2014 for a claim by Five Star of vacant possession of premises No 3 Burma Lane, 10250 Penang ('the house').

[30] He repeatedly requested for documents in respect of the appointment of the second, third, fourth and fifth defendants as trustees and whether they, as trustees have been registered on the register document of title of the land in accordance with the law and how Lot 10029 had come to be registered in the name of Five Star but his request went unanswered.

[31] His recollection handed down from his forbears was that the original trust land (Lot No 104), is a trust property given by Queen Victoria in 1845 and since the indenture referred to a trust for the benefit of the Thai and

Burmese Community in Penang, it was accepted as a public charitable trust. He was advised that all court proceedings in respect of the land, must be with the consent of the AG under s 9 of the GPA. He also doubted whether the subdivision of Lot No 2103 into Lot No 10029 and Lot No 10030 had the consent of the AG who is the *parens patriae* in respect of the trust.

[32] A search of the court file in respect of the Penang High Court Originating Summons No 24–376–2007 ('the said proceedings') disclosed that the second, third, fourth and fifth defendants were the applicants in the said proceedings. He discovered that the said proceedings were in respect of Lot No 2103 being the Burmese trust property and part of the orders sought was for a declaration that the JVA dated 25 August 2006 between the trustees of the descendants of the Burmese in Penang and the Airmas Development Sdn Bhd is valid.

[33] However, the AG's consent was not obtained, a matter not denied by the defendants. Learned counsel for plaintiffs submitted that consequently the High Court was not seised of jurisdiction to make the order dated 31 October 2007 in the said proceedings. See order of court dated 31 October 2007 at pp 215–217 of Record of Appeal (Vol 2(C)).

[34] The defendants in the second to the fifth defendants as the new trustees had submitted that the involvement of the AG was not necessary in the Penang High Court Originating Summons No 24–376–2007 as the public charitable trust had become a private trust with the partitioning in 1994. However, the plaintiffs' stand was that the character of the public charitable trust remains and the court was misled and the action was an abuse of process of court and the 2007 order was a nullity.

[35] As Nai Ninn's request for documents that could throw a light on the transactions drew a blank, he filed this OS 1128 as he is an aggrieved party and he is also involved in his private capacity as he is in possession of the house on Lot 10029 that he has been asked to deliver vacant possession to Five Star.

[36] Subsequently by a written consent dated 31 May 2016, the AG pursuant to s 9 of the GPA granted the consent for the plaintiffs (Nai Ninn) and Ho to continue with the said OS No 1128. See the written consent dated 31 May 2016 at pp 567–569 of the Record of Appeal (Volume 3C).

[37] By an order of court dated 6 October 2016, Ho intervened in the OS No 1128 and became the second plaintiff.

[38] Prior to the AG granting the consent to the plaintiffs, the AG had also considered the representation made by the defendants through their solicitors'

letter dated 19 October 2015. In that letter the defendants at p 2 thereof informed the AG that 'we are of the considered view that the Trust which exists for the Burmese Community in Penang at present is not a charitable trust but a private trust confined to only the Burmese Community in Penang. In the said letter, the defendants further stated that:

(a) However, by way of an Agreement in 1994, the Burmese trustees and the Thai trustees agreed to partition the said trust land into 2 parts, that is:

(i) one part for the Thai Community to be managed solely by the Thai trustees elected and appointed by the Thai Community in Penang, and

(ii) one part for the Burmese Community to be managed solely by the Burmese trustees elected and appointed by the Burmese Community in Penang.

(b) Pursuant to the above said Agreement, upon the joint Application of the Thai and Burmese trustees, a court order dated 19–10–1994 was obtained whereby the trust land (Lot No 104, Section 4, Georgetown, North East District, Penang held under Geran (First Grade) No 6719) was partitioned into 2 Lots, that is:

(i) Lot 2102 was registered and vested in the names of the Thai trustees ('the Thai trust Property'); and

(ii) Lot 2103 was registered and vested in the names of the Burmese trustees ('the Burmese trust Property').

(c) Thereafter, pursuant to an Order dated 3 October 2002 granted upon an application filed by the Thai and Burmese trustees, the Receiver of the Trust (Wong Hoong Keat) appointed by the Court under an Order dated 14 December 1973 and who held the trust funds of RM3,778,523.73 as at 30.6.2002, was ordered to pay:

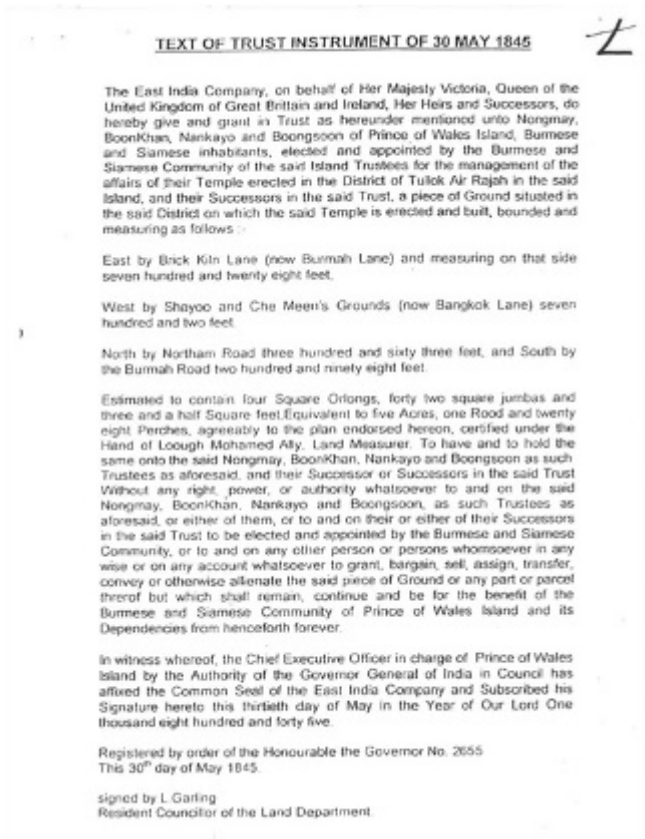
(i) the sum of RM1,889,261.86 to the trustees of the Thai Community in Penang, and

(ii) the sum of RM1,889,261.86 to the trustees of the Burmese Community in Penang.

See defendants' solicitors' letter dated 19 October 2015 at pp 235–243 of the Appeal Record (Vol 2(C)).

[39] It cannot be over-stated that from the very beginning, at the inception, the trust is a public charitable trust over the subject matter of the original trust land. It is thus a mystery how a public charitable trust can be converted to a private trust without any application being made to the High Court with the written consent of the AG to amend, alter or vary the indenture of trust of 30 May 1845.

[40] The indenture of trust was written in cursive and the text of it, in language rather archaic and magisterial as befitting that era, is reproduced below:



TEXT OF TRUST INSTRUMENT OF 30 MAY 1845

The East India Company, on behalf of Her Majesty Victoria, Queen of the United Kingdom of Great Brittain and Ireland, Her Heirs and Successors, do hereby give and grant in Trust as hereunder mentioned unto Nongmay, BoonKhan, Nankayo and Boongsoon of Prince of Wales Island, Burmese and Siamese inhabitants, elected and appointed by the Burmese and Siamese Community of the said Island Trustees for the management of the affairs of their Temple erected in the District of Tuloh Air Rajah in the said Island, and their Successors in the said Trust, a piece of Ground situated in the said District on which the said Temple is erected and built, bounded and measuring as follows :-

East by Brick Kiln Lane (now Burmah Lane) and measuring on that side seven hundred and twenty eight feet.

West by Shayoo and Che Meen's Grounds (now Bangkok Lane) seven hundred and two feet.

North by Northam Road three hundred and sixty three feet, and South by the Burmah Road two hundred and ninety eight feet.

Estimated to contain four Square Orlongs, forty two square jumbas and three and a half Square feet Equivalent to five Acres, one Rood and twenty eight Perches, agreeably to the plan endorsed hereon, certified under the Hand of Loough Mohamed Ally, Land Measurer. To have and to hold the same onto the said Nongmay, BoonKhan, Nankayo and Boongsoon as such Trustees as aforesaid, and their Successor or Successors in the said Trust Without any right, power, or authority whatsoever to and on the said Nongmay, BoonKhan, Nankayo and Boongsoon, as such Trustees as aforesaid, or either of them, or to and on their or either of their Successors in the said Trust to be elected and appointed by the Burmese and Siamese Community, or to and on any other person or persons whomsoever in any wise or on any account whatsoever to grant, bargain, sell, assign, transfer, convey or otherwise allienate the said piece of Ground or any part or parcel threrof but which shall remain, continue and be for the benefit of the Burmese and Siamese Community of Prince of Wales Island and its Dependencies from henceforth forever.

In witness whereof, the Chief Executive Officer in charge of Prince of Wales Island by the Authority of the Governor General of India in Council has affixed the Common Seal of the East India Company and Subscribed his Signature hereto this thirtieth day of May in the Year of Our Lord One thousand eight hundred and forty five.

Registered by order of the Honourable the Governor No. 2655
This 30th day of May 1845.

signed by L.Garling
Resident Councillor of the Land Department

[41] The indenture of trust created a public charitable trust for the benefit of the Burmese and Thai communities in Penang with no power to, among others, sell, transfer, or otherwise alienate the land and it was to remain and continue for the benefit of such communities. This was highlighted at para [21] of the Federal Court case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 as follows:

> [21] The dispute herein revolves around a piece of land formerly known as Lot No 2103 held under Geran No 61390 ('Lot No 2103'). Lot No 2103 was originally part of a land known as Lot No 104, Section 4, Georgetown, North East District, Penang held under Geran (First Grade) No 6719 ('Lot No 104'). Lot No 104 with a temple erected thereon was the subject matter of a religious and charitable trust created by the East India Co on behalf of Queen Victoria on 30 May 1845 for the benefit of the Burmese and Thai communities in Penang, *with no power to inter alia, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such communities* ('the Burmese-Thai trust'). (Emphasis added.)

[42] The trustees cannot arrogate to themselves the power to convert the public charitable trust into a private trust by entering into a trust deed with respect to their powers when applying to have their names registered as the new trustees with power to enter into a joint venture agreement with a third party and to transfer the land to another third party, in this case, Five Star, for the purpose for the joint venture without the written consent of the AG. No public charitable trust would be safe if trustees can unilaterally make such a decision by reference to some actions taken before which has the imprimatur of the court.

[43] The fact that part of the Burmese portion of the land had been rezoned for commercial use does not change the character of the public charitable trust for the advancement of religion. The planning authority rezoning of land use cannot be used as a reason for arguing that the public charitable trust had failed. After all there is always the commercial aspect to the advancement of religion so long as one is careful not to serve two masters.

[44] The fact that there is no Burmese temple built on the Burmese portion of the land does not mean that the public charitable trust had failed. Likewise, the excuse that there were no donations collected because there was no temple on the land appears to be a circuitous argument not unlike a fox chasing its own tail. At the end of the day much depends on the leadership and resourcefulness of the trustees for the Burmese trust property.

[45] The Thai community had constructed a Thai temple on the original trust land which later was partitioned to belong to the Thai community in keeping to the terms of the public charitable trust. The Thai community has not asserted that the trust had become a private trust for their portion of the land after the partitioning.

[46] To say as the trustees did as defendants that the Thai portion of the original trust land may continue as a public charitable trust since there is a Thai temple constructed on the Thai portion of the trust land whereas the Burmese portion of the trust land had ceased to be a public charitable trust for lack of a Burmese temple on their portion of the trust land would be a self-induced way to bring an end to or to terminate the public charitable trust which unfortunately is not how a public charitable trust is terminated or converted into a private trust.

[47] The salient terms of the trust deed of 31 July 2006 which has the effect of unilaterally amending the terms of the indenture of trust are set out below:

(1) The said Burmese trust Property will be known as the Penang Burmese Trust Property.

(2) The expression 'The Penang Burmese Trust Property' appearing in this trust deed will mean the above-mentioned Burmese trust Property and hereby granted together with all other moveable and immovable properties and other rights received or acquired by or allocated to the Burmese Community in Penang and the Penang Burmese trustees by way of donations or gifts or purchase or other mode of acquisition or joint venture activities and all articles and things offered to or otherwise received or recovered.

(3) The Penang Burmese trustees shall, out of the gross income from the Penang Burmese Trust Property and Burmese trust fund pay all the liabilities, taxes, other levies payable to the Government or other local authorities and all other outgoings for the repair and managing of the Penang Burmese Trust Property including the salaries or wages payable to the servants and other employees employed by the Penang Burmese trustees for the management of the Penang Burmese Trust Property and otherwise authorized by this trust deed or in law.

(4) Any moneys received by the Penang Burmese trustees on any account shall be credited into an account or accounts opened by the Penang Burmese trustees in one or more Banks or Financial Institutions. All expenses to be incurred will be made by drawing money by a cheque or cheques from one or the other Bank Accounts.

(5) The Penang Burmese trustees shall have power to engage the services of architects, chartered accountants, lawyers and other professionals for consultations, advice or attending to any work in connection with or in the course of administration of this trust deed from time to time and to pay their fees and other charges out of the income of the Penang Burmese Trust Property and the Burmese trust fund.

(6[a]) The Penang Burmese trustees shall be entitled to carry out repairs, renovations, additions and/or improvement to the Penang Burmese Trust Property from time to time, and meet the expenses therefore out of the corpus of the Burmese trust funds.

(6[b]) Subject to Clause 7 herein below mentioned, the Penang Burmese trustees shall have no power to sell the Penang Burmese Trust Property or any part thereof or mortgage the same, or to create a charge to any thirty party thereon. The Penang Burmese trustees, however, will have the power to purchase or otherwise acquire any immovable property including landed and non-landed or other premises in a Co-operative Housing Society or an apartment ownership if it is in the interest and benefit of the Burmese Community in Penang, but not otherwise.

(7) *The Penang Burmese trustees shall have the power to enter into a joint venture agreement and/or transaction with any such future, potential Developer and/or Contractor to develop and/or construct and/or build on the Penang Burmese Trust Property upon such terms and conditions as the Penang Burmese trustees shall deem fit and proper and for the best interest and future benefit of the Burmese Community in Penang. The Penang Burmese trustees shall only permit the said Developer and/or Contractor to cause to sell and/or charge or encumber any or all Units of Property allocated and/or belonging to the said Developer and/or Contractor only as a result of the said joint venture to such banks or financial institutions or parties solely for purpose of end-financing in respect of loans to be obtained by such end-purchasers of any or all such Units of Property belonging or allocated to the Developer and/or Contractor under the joint venture.*

(8) The Penang Burmese trustees shall also have power to lease, let, rent, manage, enter into tenancy any such property purchased or otherwise acquired and/or allocated as a result from any such joint venture agreement transaction with regards to the Penang Burmese Trust Property for the best interest and future benefit of the members of the Burmese Community in Penang which the Penang Burmese trustees shall deem fit and proper to do.

(9) The Penang Burmese trustees shall keep the Penang Burmese Trust Property as well as all other immovable property and valuable movable property of the Burmese Community in Penang insured for a reasonable amount against fire, theft and other accidents as they shall think fit and shall keep the insurance policy alive at all time.

(10) The Penang Burmese trustees will have the power to accept any donation of any property moveable or immoveable or moneys or securities provided such donation is not onerous or against the law of Malaysia and the interest of the Burmese Community in Penang and the conditions if any imposed are not inconsistent with the provisions of the Trust or contrary to the main object of this trust deed. The Penang Burmese trustees will also have the power to disburse funds for the purposes of donations to the public or charitable organizations in particular to the members of Burmese Community in Penang and the Buddhist Temples. The Penang Burmese trustees will also have the power to manage funds such as government bonds, securities, unit trusts and fixed deposits for the best interest and future benefits of the members of the Burmese Community in Penang.

(11) Any of the powers and/or authority by this trust deed given to or vested in the Penang Burmese trustees may at any time, when there is more than one Trustee, be exercised by a majority of the trustees and without the concurrence, or with merely a formal concurrence of any Trustee who by reason of illness, infirmity or otherwise may be unable, without inconvenience, to take an active part therein and such Trustee may in order to facilitate business, by power of attorney or to otherwise, empower any of the other trustees to use his or her name for execution or signature of document or for any of the purposes of this Trust without being responsible for loss and all the acts and proceedings of the majority of the trustees shall in such case be valid and effectual as if they had all concurred therein.

All acts, proceedings and exercise of discretion of the majority of the trustees shall be absolutely binding on the remainder of the trustees. (Emphasis added.)

See the trust deed dated 31 July 2006 at pp 433–444 of the appeal record (Vol 3(C)).

[48] The defining characteristic of a public charitable trust is that it must be set up for a charitable purpose and the advancement of religion is one such purpose. The four categories of a public charitable trust were first delineated by Lord Macnaughten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as follows:

(a) the relief of poverty;

(b) the advancement of education;

(c) the advancement of religion; or

(d) other purposes beneficial to the community not falling under any of preceding heads.

[49] The celebrated words of Lord Macnaughten in the *Pemsel*'s case have endured to this day and are reproduced below:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. *There is also a requirement that the trust's purposes benefit the public (or some section of the public), and not simply a group of private individuals.* (Emphasis added.)

[50] What is meant by 'some section of the public or community'? That was addressed by Lord Simonds in *Oppenheim v Tobacco Securities Trust Co Ltd and Others* [1951] 1 All ER 31 as follows:

> The question is whether that class of persons can be regarded as such a 'section of the community 'as to satisfy the test of public benefit. These words 'section of the community 'have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word 'possible') *beneficiaries must not be numerically negligible*, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be *a quality which does not depend on their relationship to a particular individual.* It is for this reason that a trust for the education of members of a family or, as in *In re Compton* [1945] Ch123, of a number of families cannot be regarded as charitable. A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

[51] What distinguishes a public charitable trust from a private trust is that there are no named beneficiaries or identifiable beneficiaries in terms of persons or people. In place of the beneficiaries is that of the requirement for a public charitable purpose. It is of course true that one cannot dissociate purpose from the people benefitting under the execution of the public charitable trust. Thus, the advancement of religion for the Burmese Community in Penang would be such that its funds and the land must be used to promote and fulfil that purpose. The fact that the Burmese Community in Penang would benefit from the achievement of the public charitable purpose is incidental and ancillary to the fulfilment of the purpose.

[52] We thus agree with the High Court that the trustees had breached the terms of the trust deed dated 31 July 2006 relating to the trust given by Queen Victoria in 1845 by transferring part of the trust property in Lot 10029 to Five Star without obtaining the consent of the AG pursuant to s 9(1) of the GPA.

[53] We further agree with the learned High Court judge Justice Azmi bin Ariffin J when he held that the defendants' contention that the public trust had become a private trust as a result of the partitioning of the original trust land (Lot 104) given by the East India Co on behalf of Her Majesty Queen Victoria, pursuant to court order dated 19 October 1994 into two lots that is Lot 2102 and Lot 2103 and the distribution of the trust funds pursuant to court order dated 3 October 2002 must fail because those court orders and the respective affidavits do not state that the public trust has become a private trust.

[54] A separate administration and management of the original trust land before the partition and subdivision into the Thai and the Burmese portion and the separate administration of the funds collected cannot in the circumstances of this case convert the public charitable trust into a private trust. Separate administration of the trust fund has no nexus whatsoever to converting the public charitable trust into a private trust. This is the stand too of the senior federal counsel ('SFC') appearing on behalf of the learned AG and we are in complete agreement with him.

[55] The separate administration was necessary as the donations had come from the devotees of the Thai temple and with no donations collected for the Burmese community as there was no Burmese temple constructed, one can foresee the simmering discontent boiling over for a continuing sharing of the funds.

[56] Likewise, the written consent of the AG of 1 June 2000 agreeing to named persons to be appointed trustees of the Thai trust and Burmese trust and for separate administration and division of the funds cannot be interpreted to mean that the AG had agreed to the Burmese portion of the trust to be terminated or converted into a private trust.

[57] Unlike a private trust which is subject to the rule against perpetuity, a public charitable trust does not suffer from that infirmity and it will continue forever unless its purpose cannot be achieved any longer, in which case the trustees may apply for the public charitable trust to be varied where its purpose is concerned so that the trust would not fail. Thus the argument of the defendants as trustees that the High Court orders of 19 October 1994 and 3 October 2002 do not say that the public charitable trust is to continue is thus misplaced and misconceived.

[58] If the original purpose of a public charitable trust cannot be achieved then an order that the *Cy pres* doctrine be applied to the trust may be explored so as to achieve a purpose as close as possible to the settlor's intention.

[59] As admitted by the defendants, no where in the court order of 19 October 1994 for the partitioning of the original trust land nor in the court order of 3 October 2002 for the equal distribution of the funds in the hands of the receiver and manager, was there any remote reference to the application of the *Cy pres* doctrine to the public charitable trust.

[60] The learned authors, Mary George and Sujata Balan, in their book titled *Malaysian Trust Law* (2nd Ed, Sweet & Maxwell (2021)), explained the *Cy pres* doctrine and its application as follows:

> [10.100] *Cy pres* is an advantage enjoyed by charitable trusts. For other private fixed trusts, the concept of resulting trusts operates. Where the particular object of charity selected by the settlor: (1) fails; or (2) becomes impossible to perform; or (3) impracticable to perform, or (4) illegal to carry out or may not exhaust the whole fund, the trust need not fail if the *cy pres* doctrine could be applied. In that case, the funds will be applied to objects as near as possible to the settlor's intention. *The cy pres doctrine enables the court to give effect to otherwise invalid or impossible purposes and this validates a trust that is performed in accordance with charities law. It gives the courts a power to reconstitute the settlor's charitable intentions so as to benefit a charity if the original purposes cannot be achieved, for whatever reason. Cy pres could be applied to the terms of a charitable trust that were inconvenient or unsuitable, as opposed to being genuinely impossible. The settlor must have intended to settle property for a genuinely charitable purpose. If that purpose cannot practicably be carried out then the court will permit the property to be used for different purposes, which achieve broadly the same charitable goals*. In *AG v Lim Poh Neo (W) & Ors* [1976] 2 MLJ 233 the court held that a gift of a burial ground to a clan was a good charitable gift. Where the gift failed due to government acquisition of the land, the proceeds of the acquisition was held to be *cy pres*. (Emphasis added.)

[61] This was the position of the trust in the Federal Court case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443. In tracing the chequered history of the case the Federal Court noted that one Cheah Leong Kean, deceased ('the testator') made a public charitable trust in his will that RM15,000 be given to his children Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang ('the initial trustees') to construct a Pagoda and outhouses. The Federal Court recounted as follows:

> [10] Then by an indenture dated 6 March 1941, four parcels of land were transferred to the initial trustees and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the Pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the said deity.
>
> [12] *The initial trustees had failed to ensure that building works were carried out as per the terms of the trust and the trust funds were all spent. On 20 August 1982, Mustapha Hussain JC (as His Lordship then was) held in Penang Originating Summons No 387*

of 1971 that a trust to construct a Pagoda is a public charitable trust and that the cy-pres doctrine be applicable. (Emphasis added.)

[62] In the worst scenario where no similar purpose may be found under the doctrine of *Cy pres*, then the land in question would revert to the settlor and in other cases, it may go to the government as *bona vacantia* — that is, ownerless goods whose title passes to the crown. There are two conditions to be fulfilled vis: (1) the requirement of a general charitable intention, and (2) the doctrine of 'impossibility'. See para [10.102] of the *The Malaysian Trust Law*.

Whether the order of the High Court for the appointment of the new trustees and the transfer of the Burmese trust property to Five Star in Lot 10029 is null and void

[63] As there has been much quibbling over the scope and applicability of s 9 of the GPA, the whole section is reproduced below:

9 Public, religious, social or charitable trusts

(1) In the case of any *alleged breach of any express* or constructive *trust for public, religious*, social or *charitable purposes*, or where the direction of the court is deemed necessary for the administration of any such trust, *the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or be joined as a party in any existing suit on behalf of the Government or the public for the purpose of —*

(a) *asserting any interest or right in the trust property;*

(b) *removing any trustee;*

(c) *appointing a new trustee;*

(d) *vesting any property in a trustee;*

(e) *directing accounts and inquiries;*

(f) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(g) *authorizing the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged;*

(h) settling a scheme; and

(i) *obtaining such further or other relief as the nature of the case may require.*

(2) *No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection.*

(3) Subject to subsections (1) and (2), all suits and proceedings in any court relating to any such trust as is therein referred to or otherwise in which the Government is interested, or in which the interests of the public are affected, or in which if brought in England the Attorney General of England would be, or would be made, a necessary party as plaintiff or defendant, whether by himself or by relation of parties, shall be brought and had in the name of the Attorney General as plaintiff or

A defendant; and the Attorney General shall have and exercise therein the same rights, duties and powers as the Attorney General of England would have and exercise in England in similar cases so far as the circumstances of Malaysia admit.

(4) The powers of the Attorney General under this section shall, in respect of any trust on the concurrent list, be exercisable by the State Attorney General. (Emphasis B added.)

[64] It is clear that under s 9(1)(c) and (d) and (d) of the GPA, the '(c) appointing a new trustee and (d) vesting any property in a trustee' has to be by way of an application to the High Court with the consent of the AG. No C consent in writing was so obtained. What then is the effect of a court action commenced without the said written consent of the AG?

[65] As far back in 1993, it had already been held that s 9(1) of the GPA is a D mandatory provision. In *Ledchumanan Nagappan v R Nadarajah & Ors* [1993] MLJU 304; [1993] 4 CLJ 253, the plaintiff there filed an action and applied for an injunction to stop the world famous Thaipusam festival to be held at Batu Caves. By the order of the Selangor Supreme Court in Civil Suit No 58 of 1929 the Subramaniar Temple Batu Caves and the property and funds thereof E were constituted to the charitable trust. Also the sole prerogative of determining and conducting the rituals of worship at the temple was vested in the board of management.

[66] On 27 December 1992, one of the five priests who performed the F Temple ceremonies died. The plaintiff filed this suit and application, inter alia, that the temple should be closed until it was consecrated due to the death of the priest. The High Court after setting out the material words of s 9(1) and (2) of the GPA held as follows at p 257 LH g-h:

The Attorney General's representative was in court although not named as a party. G The Attorney-General's view was that as there had been a total failure to comply with the three preliminary requirements this action should not be allowed to proceed. These were the existence of at least two persons having an interest, the prior written consent of the Attorney General, and the suit itself being brought in the name of the Attorney General.

H

[67] The High Court agreed wholly with the AG and counsel for the defendant and on that ground alone the action and the application were wholly misconceived and failed.

I **[68]** As to whether the suit shall be brought in the name of the AG, it appears that the AG has a discretion in allowing the suit to be brought in the names of the two persons having an interest in the outcome of the suit. In *Tetuan Khana & Co v Saling bin Lau Bee Chiang & Ors and other appeal* [2019] 3 MLJ 258, where it was it was held that the Orang Asli (Jakun) trust is not a public

charitable trust but private trust created for the 52 plaintiffs and limited to their direct lineal descendants, the Court of Appeal observed as follows:

> [43] That being the case, therefore, there is no requirement for the plaintiffs to obtain the consent in writing of the attorney general in order to institute this proceeding, or for the attorney general to be joined as a party to this proceeding.

[69] The rationale for the consent in writing of the AG has been reiterated in the Court of Appeal case of *Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) v Peguam Negara Malaysia* [2021] 5 MLJ 303 where it was observed as follows:

> [38] In *Haji Abdullah & Ors v Ibrahim & Ors* [1965] 2 MLJ 189, Mac Intyre J reiterate the position of the law regarding s 9 of the Act as follows:
>
> > Section 9(1) of the Government Proceedings Ordinance 1956 lays down the rule that where certain specified reliefs mentioned therein are sought by way of a suit in relation to any alleged breach of any express or constructive trust, or in regard to the administration of any trust for public, religious, social or charitable purposes, the Attorney-General or two or more persons with the written consent of the Attorney-General may institute the necessary proceedings in court.
> >
> > Subsection (2) of s 9 merely emphasises the necessity to conform to the provisions of sub-section (1) if any of the reliefs mentioned therein are claimed.
> >
> > Subsection (3) lays down the rule that except as to the procedure to be followed in obtaining the reliefs specified in sub-ss (1) and (2), all other suits and proceedings relating to any such trust or otherwise in which the Government is interested, or in which the interest of the public are affected, or in which the interest of the public are affected, or which if brought in England the Attorney-General of England would be a necessary party, shall be brought and had in the name of the Attorney-General as plaintiff or defendant.
> >
> > Since the reliefs claimed in the present action are brought on behalf of a charitable trust and are not among the claims specified in sub-s (1), I hold that sub-s (3) applies and that the suit should have been brought and had in the name of the Attorney-General.
>
> [39] We are of the view that the intention of the Legislature in framing s 9 of the Act is to *empower the AG in the protection of charitable trust from abuse and to prevent proceedings affecting the charity funds. The contemplated proceedings by the applicant, other than to remove the existing trustees, was also to transfer the said lands from individual trustees to society, which would definitely affect the charity funds which do not fall within the ambit of s 9 of the Act*. We are of the view that there is nothing unreasonable or irrational on the part of the AG not to grant consent, as such consent was previously granted to the existing trustees. (Emphasis added.)

[70] In the present case the trust land in Lot 10029 had been transferred to a third party company in Five Star contrary to the indenture of trust that

prohibits any transfer of the trust land. Until and unless the indenture of trust is amended no such transfer may be made in contravention of the terms of the public charitable trust.

[71] What if the action had nevertheless continued and an order is obtained in breach of the law? In this case the order obtained was for the transfer of Lot 10029 to Five Star which would be caught under s 9(2)(g) 'authorizing the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged'. Lot 10029 is now registered in the name of Five Star.

[72] The Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at pp 426 has answered this question as follows:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. *Isaacs v Robertson* is certainly not authority for the latter proposition. I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. *But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose.* It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.
>
> As Abdoolcader J observed when delivering the judgment of the former Federal Court in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39:
>
> > The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

[73] At p 429 the Federal Court further observed as follows:

> *It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist.* And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part

and parcel of the doctrine of res judicata, any role to play in the case. (Emphasis added.)

[74] The vesting of the Burmese trust property in the name of the new trustees which also required the written consent of the AG had also not been obtained. The requirement of the written consent of the AG covers in s 9(1)(c) for the appointing a new trustee and (d) for the vesting any property in a trustee; both of which had not been obtained.

[75] The natural and inevitable consequence is that the appointment of new trustees for the Burmese trust and the vesting of Lot 10030 in the name of the new trustees and the subsequent transfer of Lot 10029 to Five Star, though effected via a court order, were nevertheless null and void without the written consent of the AG.

[76] Therefore the order of the High Court vesting the Burmese trust property in the name of the new trustees in Lot 10030 and the transfer of Lot 10029 to Five Star have to be set aside and the learned High Court was right in so doing.

Whether the respondents, Nai Ninn and Ho, have the locus to commence this action in the High Court

[77] It was submitted by learned counsel for the appellants that the respondents lack the locus to commence this suit as they are not Burmese. However, the nature of a public charitable trust is such that any public-spirited person may apply to commence an action with respect to an alleged breach of a public charitable trust or the vesting of trust property in the name of the trustees provided that there is the written consent of the AG for that purpose. The same applies for a person to intervene in the proceeding.

[78] Where jurisdiction of the court is concerned it can be raised at any time by anyone who is affected by the court order for so long as the person is not a busybody and if the matter concerns a public charitable trust, then the written consent of the AG must be obtained to mount such a challenge. Where the matter is one that concerns the public as in a public charitable trust and the use of the trust property in the transfer of it to a third party contrary to the terms of the original indenture of trust, we do not think that delay, laches and estoppel would apply in the circumstances of this case.

[79] As a public charitable trust is defined by its purpose, anyone able to show a sufficient nexus to the purpose may commence such an action or to intervene in such an action, provided the written consent of the AG is

obtained. The AG at his end has to be so satisfied and suffice to say that such a person must not be a busy body but must have a sufficient interest in the public purpose of the public charitable trust.

[80] Here Nai Ninn is personally affected as he had been served with a writ of summons by Five Star to deliver vacant possession of his house built on that part of the land that is now part of the Burmese trust property, though he himself is a Thai. To deprive him of this right to commence an action against Five Star and the trustees would impinge on his right to defend the claim by Five Star and to shut his mouth from asserting that the public charitable trust had not been properly administered or that there had been a breach when the land in question had been vested in the new trustees and subsequently transferred to Five Star.

[81] Whether or not Nai Ninn is physically staying in the house at No 3, Lorong Burma is not relevant at this stage for after all, the claim against him by Five Star is for delivery of vacant possession and that is not dependent on physical occupation of the house but possession of it.

[82] As for Ho, he is a life member of the Penang Myanmar Buddhist Community Association and prima facie, he would be someone concerned about the welfare or cause of the Burmese people in Penang to be a accepted as a life member. The fact that he is not a Burmese is not important or relevant as a public charitable trust is defined by its purpose and anyone showing that he is passionate or interested in promoting the public purpose of the charitable trust may be allowed to intervene. Here the Penang Myanmar Buddhist Community Association had in its letter to the AG supported the appointment of Ho to intervene in the OS.

[83] The AG has not seen anything inappropriate or frivolous in their wanting to commence the OS and indeed this court had held in a related appeal heard together that the AG's decision to grant his written consent to Nai Ninn and Ho to commence the OS was not irrational or illegal. This OS in OS 1128 was filed by Nan Ninn against the defendants in December 2014 whereas the written consent of the AG had only been obtained on 31 May 2016, both for Nai Ninn to commence the action and for Ho Choon Teik to be joined as a co-plaintiff.

[84] It was also argued that the written consent of the AG must be had and obtained before the commencement of the action in the High Court below and not after the action had been commenced.

[85] The expression 'the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney

General, may institute a suit or *be joined as a party in any existing suit on behalf of the Government or the public*' (Emphasis added.) in s 9(1) of the GPA indicates to us that what is far more important in keeping with the rationale behind the written consent of the AG is that no frivolous action or suit is to be commenced or continued to completion without the AG having applied his mind to the action and having consented to it. If the action or suit has commenced already, then it is not to be continued, as would be a case where a second person is joined as a party to the action or suit, without the written consent of the AG.

[86] As the AG has no issue with that and was fully aware of the action that had been commenced, it would be pedantic and pointless to labour further on the point at which the consent in writing was given. There was also no application filed by the defendants to strike out the OS before the written consent of the AG was obtained.

Whether the doctrine of indefeasibility of title would prevent the setting aside of the registration of the land now in the name of Five Star

[87] Any transfer of land held under a public charitable trust without a proper and valid court order would be void as caught under the prohibition of a transfer under a void or insufficient instrument. The instrument of transfer in Form 14A under the National Land Code premised as it is on a court order that has been set aside would be void and the transfer that it purported to effect would have to be set aside.

[88] The relevant section of the National Land Code is s 340 and more particularly s 340(2)(b) and the relevant section is reproduced below:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) *The title or interest of any such person or body shall not be indefeasible —*
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) *where registration was obtained by forgery, or by means of an insufficient or void instrument*; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (Emphasis added.)

[89] We are dealing here with an immediate transferee and not a subsequent transferee or purchaser. Whilst there was a court order for the transfer of the public charitable trust property to Five Star, the said order was obtained without the written consent of the AG under s 9(1) of the GPA. Such an order has to be set aside and once it is set aside the transfer to Five Star, premised as it is on the court order, would fall as well.

[90] The meaning of 'insufficient and void instrument' was explained by the Federal Court in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 as follows:

[66] Under s 340(2)(b), the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument.

[67] In 'Tenure and Land Dealings in the Malay States' by David SY Wong, at p 364 the author explained the phrase 'insufficient or void instrument' for the purpose of s 340(2)(b) of the NLC as follows:

(iv) Insufficient or void instrument

Section 340(2)(b) also provides that a registered title is defeasible where registration was obtained 'by means of an insufficient or void instrument'. Unlike 'forgery', the expression 'insufficient or void instrument' is so wide as to defy comprehensive enumeration of the circumstances in which a purportedly executed instrument of dealing may be regarded by the court as 'insufficient or void'.

Some general observations may indicate how wide its domain may be. The reference to the insufficiency and voidness of an instrument could pertain to all sorts of circumstances and matters relating to the execution of the instrument. Where the instrument is executed in pursuance of a contract of dealing, the invalidity of contract (ie where the contract is void) would plainly entail that the instrument is void accordingly. *The instrument may also be 'insufficient or void' for reasons relating to the capacity of the parties concerned, or by reason of some formal defect or irregularity. In addition, non-compliance with relevant statutory*

requirements may also result in the instrument being regarded as 'insufficient or void'. (Emphasis added.)

[91] In *Mohd Aslam Khan bin Syed Gulam (as administrator of the estate of De Bonis Non Sikandar s/o Fajar Ellahi) v C Mageswary a/p Chandran (representative of the estate of Chandaran a/l Narayanasamy, deceased) & Ors* [2020] 2 MLJ 642 the Court of Appeal set aside a transfer purportedly by an administrator to a third party without an order of court as required under s 60(4)(a) and (6) of the Probate and Administration Act 1959 and it was observed as follows:

> [32] It was also the appellant's pleaded case that there was no previous permission from the court for the transfer of the property by Merlhat to Chandaran. This was completely overlooked by the learned trial judge. Under s 60(4)(a) and (6) of the Probate and Administration Act 1959, it is mandatory to obtain the previous permission of the court before an administrator of an estate can execute any transfer of the estate's property failing which the transfer 'shall be voidable at the instance of any person interested in the property'.
>
> [33] *Since there was no previous permission of the court for the transfer of the property, the purported transfer of the property from Merlhat to Chandaran, if at all it took place, is void and liable to be set aside.*
>
> [34] The appellant had also pleaded the issue of constructive trustee but this too was completely overlooked by the learned trial judge, probably due to his finding that Chandaran had good title to the property. *It is clear that Chandaran's title to the property was a result of insufficient or void instruments and is therefore defeasible,* being tainted with fraud. (Emphasis added.)

[92] The transfer of Lot 10029 to Five Star, premised as it is on a court order that has been set aside, must fall with it and fail. The said transfer has to be set aside.

Decision and consequential orders

[93] We would allow the appeal in part as stated below and affirm the rest of the order of the High Court dated 24 November 2017. However, we would vary the order only to the following extent taking into consideration the concessions made by the plaintiffs/appellants in the appeal and the views expressed by the learned SFC for the AG.

[94] With respect to the order in para 1 of the High Court order appealed against, the plaintiffs conceded that all the relevant documents had already been disclosed to them by the defendants and so the prayer is rather academic. We therefore set aside the order in para 1.

[95] As for para 2 of the High Court order, it was clarified that the plaintiffs are not challenging the 'split' via the 1994 and the 2002 consent of the AG but rather the subsequent subdivision of the Burmese portion into two separate pieces of land Lot 10029 (Five Star) and Lot 10030 (new Burmese trustees). To now amalgamate back the two titles into one may not necessarily be in the best interest of the Burmese trust and as there is no diminution of the interest of the Burmese trust it would be sufficient if the two pieces of land remain in the name of the original trustees. In any event a subdivision per se does not require the consent of the AG as there is no divesting of interest or title in the trust property. Therefore, we set aside para 2 of the court order.

[96] As for para 3, we find that consequentially upon this court agreeing with the High Court that the public trust remains, the order declaring the transfer of Lot 10029 to Five Star and the vesting of Lot 10030 to the new trustees are unlawful and so declared null and void and of no legal effect is correct. Therefore, the order in para 3 is affirmed.

[97] The lands in question in Lot 10029 Seksyen 4 Bandar Georgetown DaerahTimur Laut Pulau Pinang in Geran No Hakmilik HSD 18532 and Lot No 10030, Seksyen 4 Bandar Georgetown Daerah Timur Laut, Pulau Pinang in Geran Hakmilik HSD 18533 would remain in the name of the original trustees of the land and as the original trustee Hla Toon Toolseram is still around and able to act, we order that the said Lot 10029 and Lot 10030 be vested in the name of Hla Toon Toolseram as trustee and that the names of the three new trustees in the third to the fifth defendants in the High Court below be removed.

[98] As for para 4, after hearing the parties including the learned SFC representing the AG, who had no objection to the appellants' solicitors holding the said titles, we would vary the order accordingly and order that both the titles to Lot 10029 and Lot 10030 be kept with the current solicitors on record for the appellants with the undertaking of the said solicitors or any subsequent solicitors so appointed, not to deal with the titles except with the express written consent of the AG. For that purpose, the two titles currently with the High Court in Penang shall be kept henceforth with the said solicitors.

[99] As for para 5, the said ex parte order of the Penang High Court dated 31 October 2007 declaring the JVA valid and transferring Lot 10029 to Five Star was obtained without the written consent of the AG under s 9(1) of the GPA and so that order had to be set aside and thus para 5 of the High Court order is affirmed.

[100] As for para 6, the High Court order remains for the reasons above given and the two pieces of land shall revert to the name of the original trustee still surviving ie Hla Toon Toolseram.

[101] As for para 7, the order of the High Court is not necessary in the light of this court's order that the titles be so kept with the said defendants'/appellants' solicitors with their undertaking being recorded and so para 7 of the order is set aside.

[102] As for para 8 of the High Court order, it shall remain with the name of Five Star being removed for Lot 10029 and the name of the third to the fifth defendants being removed from Lot 10030.

[103] As for para 9, the learned SFC agreed that there is no need to have the two pieces of land registered in the AG's name and so the said order is varied with the two pieces of land to be registered in the original trustee's name ie Hla Toon Toolseram.

[104] As for para 10, the order empowering the Registrar of Land Titles to effect the necessary changes to the said titles is affirmed.

[105] As for para 11, the order is affirmed for the defendants in the second to the fifth defendants to provide the accounts of the Penang Burmese Trust Property to the court with a further order that the accounts be produced within six calendar months from today.

[106] As for para 12, since there is no evidence of misappropriation of trust monies, we shall set aside the order and confine it to the production of the account from the 'split' in 2002 within six calendar months from today.

[107] As for para 13 we affirm the award of costs of RM4,000 by the High Court below.

[108] As for para 14 the prayer for liberty to apply shall remain.

[109] The High Court order is varied only to the above extent. We make no order as to costs for this appeal.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh